The Central Law Journal.

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CURRENT TOPICS.

As we said a few weeks ago, we are firm believers in the correctness and propriety of the doctrine that the judiciary are, by virtue of the exalted, and public character of the position which they occupy, the legitimate object of criticism, and we have never hesitated to assume responsibility for the expression of our opinions, however severely they may have reflected upon judges as individuals, or as a class. Feeling, however, that we have a good deal to answer for in this line, we are somewhat chary of having the strictures of others attributed to us, and pass the mistake unnoted and uncorrected. We therefore take the liberty of calling the attention of our esteemed contemporary, the *Daily Register* of New York, to the fact that in its issue of August 12, 1882, it attributed to the CENTRAL LAW JOURNAL a criticism of the Missouri Appellate Courts which we never printed, and with which we do not concur. The stricture referred to occurred in a notice in the June-July number of the *Southern Law Review* (p. 190), of the Seventy-Third Volume of Missouri Reports, and is in the following words:

"Of the one hundred and thirty-nine cases reported, seven were original. Of the others, seventy-two were reversed, and only sixty were affirmed.

"Of these cases seventeen were from the St. Louis Court of Appeals—an intermediate appellate court of much merit—but seven of its judgments were reversed and ten affirmed.

"It seems that Missouri suitors may reasonably act on the idea that an adverse decision below by a *nisi prius* court, is presumably erroneous. At least the chances of a reversal on appeal are plainly in favor of that conclusion."

On this point the *Register* very pertinently remarks: "A moment's consideration will show that the only object of an appellate court is to reverse, and if suitors are advised to appeal in a case in which the chances of reversal are not in their favor, they are badly advised." And then, after noting that of all the decisions taken up (presumably the most questionable, in the eyes of the profession, of the many thousand decided), in barely one-half are the appellants successful, it proceeds to say that (inasmuch as in those cases appealed from the Court of Appeals, the proportion of the reversals was much smaller, being only seven cases out of seventeen), "if the per centage were much smaller the question would soon arise whether a court that was so rarely reversed ought not to be made a court of last resort. It is of no use to maintain an Appellate Court except for the purpose of reversing. We notice this because it is a very common illusion among the critically inclined among the profession and the press to compute the per centage of reversals on the number of appeals, instead of the number of decisions below appealed or not." All of which is most righteous truth. Verily, a prophet is not without honor, save in his own country.

At the recent meeting of the American Bar Association, the following well known gentlemen of the Missouri bar were among the newly elected officers: Henry Hitchcock, Esq., (re-elected) Vice President for Missouri; W. H. H. Russell, Esq., General Council; and Hon. Warwick Hough, George A. Madill and James E. Withrow, Esqs., Local Council.

The draft printed below of an act intended to effect a needed reform in divorce law, is, in our opinion, a model of precision and conciseness, which is indeed rare upon the statute books. It was submitted by the committee, of the American Bar Association, on Jurisprudence and Law Reform, in conjunction with the third of the resolutions printed in our last week's issue (15 Cent. L. J. 121):

AN ACT TO PREVENT FRAUDULENT DIVORCES.

The jurisdiction of the courts of this State, in suits for divorce, shall be confined to the following classes of cases:

1. Where both parties were domiciled within this State when the action was commenced.

2. Where the plaintiff was domiciled within this State when the action was commenced, and the defendant was personally served with process within this State.

3. Where one of the parties was domiciled within this State when the action was commenced, and one or the other of them actually resided within this State for one year next preceding the commencement of the action.

The Association further recommended by

resolution, that the several local councils and State and local bar associations be requested to advocate its enactment in their respective States.

RIGHTS AND LIABILITIES OF THE OWNER, HIRER AND DRIVER OF HORSES.

The law which declares these rights and liabilities is not only often directly applicable, but also well illustrates such leading legal principles as can not be too frequently recalled and considered.

The driver of horses must use ordinary care,[1] but what would constitute ordinary care in a footman on the sidewalk would not become a driver, who is in so much greater danger of inflicting or suffering injury. Wherefore, as was said in Prideaux v. Mineral Point: [2] "Driving in the dark without thinking of danger, as one 'whistling for want of thought,' is surely not ordinary care." Greater care is demanded of a driver along city streets than on a country highway,[3] and it is not in restraint of trade for a city to forbid the driving of horses "on a trot or gallop in the street." [4] A driver must be more careful near a military encampment, and where there is a concourse of people, than in a less frequented place.[5] In Pluckwell v. Wilson,[6] Alderson, J., observed, "that a person was not bound to keep on the ordinary side of the road," but if he does not he is required to "keep a better out-look" than usual. In Michael v. Alestree,[7] the defendants were charged with training "ferocious" horses in a public place, "*eux improvide incaute et absque debita consideratione ineptitudinis loci.*" A driver who leaves his horses unsecured and unattended in the streets is responsible for the consequences,[8] even though the horses are started by a third person wilfully striking them,[9] or the injury befalls a child mischievously playing with them.[10] But such losses as result from inevitable accidents, as those caused by a runaway horse, frightened by a locomotive, can not, by any legal doctrine be lifted from the plaintiff's shoulders, where misfortune has placed them, and laid upon the innocent defendant's.

Where a master has intrusted his servant with a horse, and the servant is driving the horse about his master's business, the servant's careless driving is chargeable upon the master,[12] as is also that of another person to whom the servant has passed the line, whilst the servant sits on the seat beside him.[13] But if the master does not provide his servant with a horse, and the servant procures one, even though to expedite his master's business, the master is not chargeable with his servant's careless driving, as he never trusted him with a horse.[14] The courts have not determined with equal strictness when the driver is engaged about his master's business.[15] If the servant has taken the horse "surreptitiously," or has driven off "on a frolic of his own," [16] the master is not responsible, but he has been held so where the servant was driving home in a "roundabout" way, or "out of his way against his master's implied commands." [17] Yet the ruling upon this point in some of the English cases is so narrowed, that one needs a map of London before him to study them intelligently, C. J. Cockburn, holding in Storey

[1] Laeme v. Bray, 3 East. 593; Goodman v. Taylor, C. & P. 410; Powell v. Deveney, 3 Cush. 300; Howard v. North Bridgewater, 16 Pick. 189. Even where the defendant left a fettered donkey in the highway, the plaintiff's fast driving was not excused. Davies v. Mann, 10 M. & W. 546.

[2] 43 Wis. 525.

[3] McDonald v. Snelling, 14 Allen, 290.

[4] Commonwealth v. Worcester, 3 Pick. 462.

[5] Warner v. Morison, 3 Allen, 564.

[6] 5 C. & P., 375.

[7] 2 Levinz, 172.

[8] Western Union Telegraph Co. v. Quinn, 56 Ill. 320.

[9] Illidge v. Goodwin, 5 C. & P. 190.

[10] Lynch v. Nurdin, 1 Ad. & El. (N. S.) 29.

[11] Goodman v. Taylor, 5 C. & P. 410; Pluckwell v. Wilson, 5 C. & P. 375; Brown v. Collins, 53 N. H. 442, and cases there cited; Holmes v. Mather, Eng. Ct. of Ex., June, 1875. But some leading English cases are to the contrary.

[12] Bruckner v. Fromont, 6 T. R. 659; Day v. Edwards, 5 T. R. 648; Mosely v. Gaisford, 2 H. Bl. 443; Moreton v. Harden, 6 Dowl. & Ryl. 275; Patten v. Rea, 2 C. B. (N. S.) 606; Dimock v. Suffield, 30 Conn. 129; Stone v. Hills, 45 Conn. 44; Maddox v. Brown, 71 Me. 432; Wright v. Wilcox, 19 Wend. 343; Campbell v. Providence, 9 R. I. 262.

[13] Booth v. Wister, 7 C. & P. 66; Joel v. Morison, 6 C. & P. 501.

[14] Godman v. Kennell, 3 C. & P. 167; McManus v. Crickett, 1 East. 106.

[15] Seymour v. Greenwood, 7 H. & N. 355; Whatman v. Pearson, L. R. 3 C. P. 422; Phelon v. Stiles, 43 Conn. 426; Sheridan v. Chadwick, 4 Daly, 338; Cavanaugh v. Dinsmore, 12 Hun, 465; Howe v. Newmarch, 12 Allen, 49.

[16] Joel v. Morison, 6 C. & P. 501.

[17] Sleath v. Wilson, 9 C. & P. 607; Mitchell v. Crassweller, 13 C. B. 237.

v. Ashton,[18] that it was "a question of degree as to how far the deviation could be considered a separate journey." Even the wilful misconduct of the driver has been held, in some English cases, chargeable to the master, if the servant perpetrated it with the design of forwarding his master's interest.[19] In Limpus v. Omnibus Co.,[20] Byles, J., said "that if a servant acts in the prosecution of his master's business, for the benefit of his master and not for the benefit of himself, the master is liable, although the act may, in one sense, be wilful on the part of the servant." Yet the wilfulness of the servant's wrongful act, done against the master's express or implied commands, is usually held to have severed, *ipso facto*, the relationship of master and servant. Thus, in McManus v. Crickett,[21] Kenyon, C. J., said that "the servant by wilfully driving the chariot against the plaintiff's chaise without his master's assent, gained a special property for the time, and so to that purpose the chariot was the servant's." And where the master lends his horse to his servant for the servant's own use, the master is not chargeable with the servant's negligence;[22] but otherwise, if engaged in part on his master's business.[23] Where a son, without the knowledge of his father, drove his father's horse and carriage, the father was held not liable for his son's careless driving;[24] but otherwise held, where a son, with his father's consent, drove the family carriage, with his two sisters in his charge, to a picnic, it being decided that "the son must be regarded as in the father's employment, discharging a duty usually performed by a slave."[25] Where one, however, merely borrows or hires a horse, and the relationship of bailor and bailee,[26] and not of master and servant, is established, the owner of the horse, even though a licensed livery-stable keeper, can not be made liable for the results of negligent driving.[27] In Herlily v. Smith,[28] it was claimed that a livery-stable keeper, in a "commercial city," owes it to the public not to trust his movable property to drivers wanting in experience, as was the boy who hired the carriage in this case. Counsel for plaintiff cited eight English cases, not one of which is in point. The court excused the defendants from replying, deciding in their favor with the remark, that "this case is too plain for discussion." Again, where A merely hires B and his wagon to do his service, and the wagon remains under B's charge, A is no more liable for B's careless driving, than for the negligence of the engineer of the train which carries A's goods.[29]

Where one hires a horse, he is required, on his part, to feed and water him, drive him with prudence, and exercise the customary care demanded of a bailee for hire.[30] In Rowland v. Jones,[31] the court said that "at the first blush, it does not seem that thirty-three miles in seven hours is hard driving. But then the condition of the road, the supply of water, etc., makes a great difference. Deep sand, no water, a heavy load and hot sun may have exhausted the horses," and a verdict for the plaintiff was not disturbed. Also, does the law force the hirer to keep the contract he made, expressly or impliedly, when he hired the horse, and he is liable, though a minor, for a conversion of the horse, if he drives further or in a different direction than the contract permits,[32] even though the contract be made on Sunday, and therefore illegal,

[18] L. R. (4 Q. B.) 476. In this case, Cockburn, C. J., said: "We can not adopt the view of Erskine, J., in Sleath v. Wilson;" yet adds, "I am very far from saying if the servant, when going on his master's business, took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master," which, according to the facts of the case in Sleath v. Wilson, was the only point that Erskine, J., could have judicially decided.

[19] Croft v. Alison, 4 B. & A. 592.

[20] 1 H. & C. 526. And in Seymour v. Greenwood, *supra*, Pollock, C. B., puts the question: "Suppose a servant driving along a road, in order to avoid a danger, intentionally drove against the carriage of another, would not the master be responsible?"

[21] 1 East. 106, In support of this doctrine, see, also, 2 Roll. Abr. 553; Lyons v. Martin, 8 Ad. & El. 512; Lamb v. Polk, 9 C. & P. 607; Church v. Mansfield, 20 Conn. 287.

[22] Cormack v. Digby, 9 Irish R. (C. L. S.) 557; Bard v. John, 26 Pa. 482.

[23] Patten v. Rea, 2 C. B. (N. S.) 606.

[24] Maddox v. Brown, 71 Me. 432.

[25] Lashbrook v. Patten, 1 Duvall (Ky.), 316.

[26] Fowler v. Lock, L. R. 10 C. P. 90.

[27] Bard v. John, 26 Pa. 482.

[28] 116 Mass. 265.

[29] Ward v. Cobb, 13 Allen, 58; Kimball v. Cushman, 103 Mass. 194; Huff v. Ford, 126 Mass. 24.

[30] Dean v. Branthwaite, 5 Esp. 35; McManus v. Crickett, 1 East, 106; Edwards v. Carr, 13 Gray, 234; Wright v. Wilcox, 19 Wend. 343; Buis v. Cork, 60 Mo. 391.

[31] 73 N. C. 52.

[32] Wheelock v. Wheelwright, 5 Mass. 104; Homer v. Thwing, 3. Pick. 492; Rotch v. Hawes, 12 Pick. 126; Campbell v. Stakes, 2 Wend. 137; Towne v. Wiley, 23 Vt. 355; Lucas v. Trumbull, 15 Gray, 306.

since the action is not on the contract.[33] "If a horse is hired as a saddle horse, the hirer has no right to use the horse in a cart, or to carry loads as a beast of burden."[34] Where several contract together for a team, they are jointly liable to the owner. and to third persons, for the results of the careless driving of any one of their party;[35] but where one hires the team and invites another to ride, or carries another for hire, the passenger or guest is not liable, unless he is driving; and even then not, of course, upon the contract.[36] Some proof of negligence on the part of the hirer must be given, even when it was shown that the horse was steady going, and returned in an injured condition.[37] But where the owner sends his own driver with the horses, the hirer is exempted from liability, the same as if the owner was driving himself;[38] yet may be held liable to third persons, if he recklessly suffered the driver to cause the damage.[39] Even when the hirer of the horses owns the carriage, it has finally been held, after the doubts thrown upon the point by the case of Laugher v. Pointers,[40] that he is not responsible for the results of the negligent conduct of the driver, if he be the servant of the owner of the horses.[41]

The livery stable keeper is legally bound to furnish the hirer a horse and vehicle able to do the work required by the contract of hiring. Thus in Leach v. French,[42] it was held that "one who lets a horse, impliedly undertakes that the animal shall be capable of performing the journey for which he is let; and if, without fault of the hirer, he becomes disabled by lameness or sickness, so that the hirer is compelled to incur expense to procure other means of returning, such expense may be recouped against the demand of the bailor for the services." And in Hyman v. Wye,[43] it was held that the person who lets out a carriage must supply one "as fit for the purpose for which it is hired as care and skill can render it."

The owner or driver of horses who suffers from impeded or defective highways, or from obstructions calculated to frighten horses, can, of course, recover, if without fault himself.[44] But "slight want of ordinary care will defeat an action for injury" thus caused.[45] Yet it is interesting to know "that permitting a woman to drive is not conclusive evidence of such want of ordinary care"[46] as will prevent a recovery against a town; neither is the driving, in a stormy night, through a strange city.[47] If the driver's negligence did not contribute to the injury, it can not, of course, be made a defense.[48] Thus it has been held that one who is injured by cause of a defective way, may recover, though he was driving at the time more rapidly than a city ordinance permitted, if the jury find that "such driving did not in any degree contribute to produce it."[49] But one "who travels on Sunday in violation of the Lord's Day act, can not maintain an action against a town for a defect in the highway, or against the proprietors of a street railway in whose car he is a passenger," since his illegal travelling "necessarily contributed to the injury;"[50] and also is one prevented, for a like reason, from

[33] Woodman v. Hubbard, 5 Forster, 67; Morton v. Glaster, 46 Me. 520; Hall v. Corcoran, 107 Mass. 251 (overruling Gregg v. Wyman, 4 Cush. 322).

[34] Columbus v. Howard, 6 Ga. 218.

[35] Davey v. Chamberlain, 4 Esp. 229; Bishop v. Ely, 9 Johns. 294; Obrien v. Bound, 2 Spears, (S. C.) 499.

[36] Graves v. Moses, 13 Minn. 335.

[37] Cooper v. Barton, Campbell, 5 (note); Leach v. French, 69 Me. 389; Newton v. Pope, 1 Cow. 109. But see Collins v. Bennett, 46 N. Y. 490.

[38] Jones on Bail., 88; Hughes v. Bower, 9 Watts.5 62.

[39] McLaughlin v. Pryor, 4 M. & G. 48.

[40] 5 B. & C. 547.

[41] Quarman v. Burnett, 6 M. & W. 499.

[42] 69 Me. 389.

[43] Eng. High Court, Queen's Bench Div., reported in 13 Cent. L. J. 254.

[44] Davis v. Mann, 10 M. & W. 546; Flower v. Adam, 2 Taunt. 314; Adams v. Carlisle, 21 Pick. 146; Lane v. Crombie, 12 Pick. 177; Centralia v. Scott, 59 Ill. 129; Coggswell v. Lexington, 4 Cush. 307; Davis v. Hill, 41 N. H. 329; Heland v. Lowell, 3 Allen, 407; Worcester v. Essex, 7 Gray, 457; Harlow v. Humister, 6 Cow. 89; Smith v. Smith, 2 Pick. 621; Cremer v. Portland, 36 Wis. 92; Watson v. Lisbon, 14 Me. 201; Jenks v. Wilbraham, 14 Gray, 142; Marble v. Worcester, 4 Gray, 395; Tisdale v. Norton, 8 Met. 388; May v. Princeton, 11 Met. 442; Wheeler v. Westport, 30 Wis. 392; Kelley v. Fond du Lac. 31 Wis. 179; Rock Island v. Vanlandschoot, 78 Ill. 485; Hunt v. Pownal, 9 Vt. 411; Littleton v. Richardson, 32 N. H. 59. But in Kingsbury v. Dedham, 13 Allen, 186, it was held that an object in the highway, tending to frighten, but not to obstruct, a horse, is not such a defect in the highway as to make the town liable.

[45] Prideaux v. Mineral Point, 43 Wis. 513.

[46] Cobb v. Standish, 14 Me. 198.

[47] Milwaukee v. Davis, 6 Wis. 377.

[48] Butterfield v. Forester, 11 East, 60; Welch v. Wesson, 5 Gray, 505; Morton v. Glaster, 46 Me. 520; Bigelow v. Reed, 51 Me. 325.

[49] Baker v. Portland, 58 Me. 199; Blood v. Tynsborough, 103 Mass. 509.

[50] Bosworth v. Swansey, 10 Met. 363; Huckley v. Penobscot, 42 Me. 89; Jones v. Andover, 10 Allen, 18; Stanton v. Metropolitan R. Co., 14 Allen, 485; Hall v. Corcoran, 107 Mass. 251.

recovering against a town, when the injury was received at the time the plaintiff was driving over a bridge at a rate faster than a walk, against an ordinance of which he was ignorant. [51]

Where one negligently frightens a horse, who injures third persons, he is liable to them in damages, if there be the intervention of no "new responsible cause;" [52] but where the horse was frightened by some defect in the highway, the town has been held not liable, save where the occupant of the vehicle was injured, or third persons, at the place of the defect.[53] Thus in Marble v. Worcester,[54] the court held that the plaintiff had no cause of action against the town, since he "was a stranger to all connection with the horse and sleigh, the driving and all circumstances of the accident, and also at a great distance from the place of the defect. In this respect we think this case is peculiar, and without precedent."

New York courts have held that if the plaintiff has no connection with the horse or driver, save that the plaintiff has been invited to ride, that the contributory negligence of the driver can not be charged to the plaintiff in an action for damages against third persons.[55] But, under like circumstances, the Wisconsin court, in a well considered opinion, has held that although when the plaintiff must, according to "the state of society," take a public conveyance, he is not chargeable with the contributory negligence of the carrier; but that he is so, when, as a matter of choice or desire, he rides in a private conveyance. The court observes that "it seems little less than idle to compare the relation of a woman voluntarily riding for her pleasure with her lover, friend or relative in his carriage, with the relation of a passenger to the carrier on whose cars or vessel he is practically obliged to travel;" which sounds strongly of good "horse sense," even if future cases shall not find it to be good "horse law."

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51 Heland v. Lowell, 3 Allen, 407.

52 Lee v. Union R. Co., 12 R. I. 383; Powell v. Deveney, 3 Cush. 300; Clark v. Lebanon, 63 Me. 393.

53 McDonald v. Snelling, 14 Allen, 290; Jenks v. Milbraham, 14 Gray, 142; Rockford v. Tripp, 83 Ill. 247. But see Kelsey v. Glover, 15 Vt. 708.

54 4 Gray, 395.

55 Metcalf v. Baker, 1 Abb. Pr. 431; Robinson v. New York Central, etc. R. Co., 66 N. Y. 11. In the last cited case, the court seemed troubled to explain away a previous sentiment, if not decision, of the court. "It was stated," the opinion says, "in Brown v. New York Central R. Co. (32 N. Y. 537), which was the case of a passenger in a stage coach, the majority of the judges were of opinion that the negligence of the driver was imputable to the passenger, but the point was not decided."

SUNDAY LAWS — WORKS OF NECESSITY.

The judges of the Common Pleas Division have just decided in Regina v. Taylor, that it is unlawful for an ordinary barber to shave his customers upon Sunday; and this on the ground that he is a workman within the meaning of the Lord's Day Act,[1] and the shaving is a worldly labor or work done by him in the course of his ordinary calling as a barber, and is not a work of necessity or charity. Their lordships were not prepared to say that a barber connected with an hotel would not be permitted to shave on the sacred day; for in such a case he might be looked upon as a servant kept in a private family to do work on Sundays as well as other days. The court considered the Scotch case of Philips v. Innes,[2] decided in 1837, and in which the House of Lords declared shaving on Sunday by a barber not a work of necessity or mercy, a binding decision.

The subject is not only an important, but also an interesting one. It has been considered by several courts on the other side of the line. In Commonwealth v. Jacobus,[3] it was held that the business of a barber in shaving his customers on Sunday morning is "worldly employment," not "a work of necessity or charity." The court said: "It is argued that as the law does not forbid a person to wash and shave himself on Sunday, and thus to prepare himself to attend public worship, or otherwise properly to enjoy the rest and recuperation which it was the purpose of the day to give, therefore, another may do it for him without incurring the condemnation of the law. This view is not sustained by the authorities. * * * * It is further contended by the counsel for the defendant,

1 Rev. Stat. Ontario, ch. 189, sec. 1.

2 4 C. & F., 234.

3 1 Pa. Leg. Gaz. R., 491.

that long continued usage and customs of society, prove that the business of a barber is by common consent, considered a necessity within the meaning of the law. * * * * But is it a work of necessity? Many persons shave themselves on that day, who are shaved by a barber on other days of the week, and not one in ten who shave on that day employ the services of a barber. In this case Jacobus shut up his "tonsorial parlor" at ten o'clock on Sunday morning; the court thought that made no difference, and added: "If the closing of these shops on Sundays is an inconvenience to the public, the remedy rests with the legislature, and not with the court."

Lord Brougham, by the way, in Phillips v. Innes, seemed to think that the shaving might be done in Dundee on Saturday, as the Glasgow people did it then. The magistrates of Dundee had held that shaving on the Sabbath was right, although it was "not lawful for the barber to work in the making of wigs on Sunday."

In another case in Pennsylvania, it was held to be illegal for a barber to shave on Sunday, even those who were sick on Saturday, and could not come on that day to be cleansed; and the fact that he did not charge for his labor is considered no excuse.[4] Even so late as the middle of the eighteenth century, "ministers were sometimes libelled" in Scotland "for shaving" themselves on the Lord's day.[5]

On the other hand, a barber at Tunbridge Wells was summoned for infringing the act of Charles II., and he ingeniously pleaded that if any of his customers had no money they were shaved for nothing, thus making the operation a work of charity," and further, that if a footman or waiter were not shaved on Sundays he would probably be discharged, and to serve him was therefore "a necessity." This satisfied the magistrate, and the summons was destroyed.[6]

And in Tennessee, a couple of years ago, it was held that keeping open a barber's shop on Sunday is not indictable as a misdemeanor or a nuisance. It was held not to be a misdemeanor, because a penalty for the violation of the Sunday laws is imposed. The question then was whether it was a nuisance, and the court said: "It can not be said that a barber's shop is something which incommodes or annoys, or which produces inconvenience or damage to others. On the contrary, the business of barbering is so essential to the comfort and convenience of the inhabitants of a town or city, that it may be regarded as a necessary occupation. To hold that it becomes a nuisance when carried on on Sunday, is a perversion of the term 'nuisance.' All that can be said of it is, that when prosecuted on Sunday it is a violation of the statute, and subject to be proceeded against as prescribed by law, but not subject to be indicted as a nuisance. It may shock the moral sense of a portion of the community, to see the barber carrying on his business with open doors on Sunday, but it produces no inconvenience or damage to others, and, therefore, can not be regarded in legal contemplation 'a nuisance.'"[7]

It appears that every State in the Union, except Louisiana, has a Sunday law; the original and model of most of them is the English statute of 1676, passed when Charles II. was king. The laws differ greatly, therefore do the decisions; but the general principle of all is the same; ordinary business and labor is forbidden, except works of necessity and charity. In some of the States the laws contain special provisions against what we may assume to be the besetting sins of the inhabitants. The Arkansas statute punishes Sunday indulgence in bragg, bluff, poker, seven-up, three-up, twenty-one, thirteen cards, the odd trick, forty-five, whist or any other game at cards by a fine of from $25 to $50. California charges from $50 to $500 (in the shape of a fine) for attending any bull, bear, cock or prize fight, horse race or circus; or for keeping open any gambling house, or any place of barbarous or noisy amusement, or any theater where liquor is sold on the Lord's day. In ages gone by in England bull baiting or bear baiting used to cost three shillings and four pence, and wrestling and bowling five shillings, upon Sunday.[8] The Florida law enacts that any one disturbing a congregation of whites, is subject to a penalty of not more than $100; or the offender may be whipped, the stripes not to exceed the orthodox forty

[4] Commonwealth v. Williams, Pearson's Decisions, 61.

[5] 3 Buckle, civ. eh. iv., note 183.

[6] The *Graphic*, Nov. 27, 1879.

[7] State v. Lorry, 7 Baxt. 95.

[8] 1 Car. I.

save one; or be imprisoned for not more than six months.

South Carolina alone sticks to the old notion of compelling people to go to church. Her statute provides, "that all persons having no reasonable or lawful excuse, on every Lord's day shall resort to some meeting or assembly of religious worship, tolerated and allowed by the laws of the State, and shall there abide orderly and soberly during the time of prayer and preaching, on pain of forfeiture, for every neglect of the same, of the sum of one dollar."

In the original Sunday-go-to-Meeting Act, that of Elizabeth; every person had to repair to his parish church every Sunday, on pain of forfeiting one shilling for each offense; and any one over sixteen who absented himself for a month, forfeited £20 a month. [9]

In Indiana the act forbidding working, etc., on the day of rest, applies only to those over fourteen years of age.

"Necessity" is a relative term, and the law does not mean that the work to be allowed must be "absolutely necessary." If nothing but absolute necessity were intended, it would, in general, be unlawful to prepare a meal on the Sabbath, because it might without difficulty be previously prepared, or most people might safely enough fast for twenty-four hours. To supply gas light would be equally unlawful, for people might use candles previously provided, or might retire to bed at twilight.

The great object of all these laws is to make the day a day of rest; but some things are more important and necessary than even rest; and the doing of such things when indispensable is allowed. So it was held that the seasonable preparation of breakfast for her employer's family was such a work of necessity, as justified a maid servant in travelling on Sunday morning; [10] and a servant man may drive his master's household to church in his master's carriage. [11] In fact "the law has never been regarded as applying to the proper internal economy of the family. It does not except the ordinary employment of making fires and beds, cleaning up chambers and fire-places, washing dishes, feeding cattle, and harnessing horses for going to church, because these were never regarded as the worldly business of the family, and therefore not forbidden to the head of the family, or to any of the domestics."

In Pennsylvania it was held unlawful to run street cars on Sunday, [12] or an omnibus, [13] even if the omnibus is used partly by church goers it will not help the case. Still, "if an invalid, or a person immersed for six days within the close walls of a city, requires a ride into the country as a means of recuperation, which is the true idea of rest, there is nothing in the act of 1794 to forbid the employment of a driver, horses and carriages on Sunday to accomplish it. Equally lawful is the employment of the same means to go to the church of one's choice, or to visit the grave of the loved and lost to pay the tribute of a tear." [14] In Georgia, however, it was recently decided that the running of street cars in cities and their vicinity is a work of necessity. [15]

Apropos, of the labor of domestic servants. A doctor's boy, having declined to wash his master's gig on Sunday, had the pleasure of drawing forth from the judge of the Aberdeen and Kincardine Small Debt Court the following remarks: "It is essential to bear in mind that in determining what is a work of necessity in a domestic establishment, a great deal must be left to the discretion of the master. Life would be intolerable in a house in which the servants were to refuse to do a certain piece of ordinary work on a Sunday, which their employer thought necessary, on the ground that they were of a different opinion. The Sunday work which a master may insist upon having done, must be reasonably incidental to work that is necessary. For example, I should hesitate to hold that the master was entitled to insist that Sunday should be the weekly washing day, or the day on which the silver plate, not in daily use, was to have its periodical scrubbing. On the other hand, a servant would be bound to see that such things as are in use at every meal are cleaned, even although that involve the operation of cleaning being done between the first Sunday meal and the second." The judge held that the boy should have obeyed

[9] Eliz. c. 2; 23 Eliz. c. 1.
[10] Crossman v. Lyon, 121 Mass. 301.
[11] Commonwealth v. Nesbit, 24 Pa. St. 398.
[12] Commonwealth v. Jeandell, 2 Gr. Pa. Cas 506.
[13] Commonwealth v. Johnston, 22 Pa. St. 102.
[14] Commonwealth v. Jonston, *supra*.
[15] Augusta, etc. R. Co. v. Renz, 55 Ga. 126.

his master, and that he was not excused by having offered on Sunday night to clean it.[16] Even the 29 Car. II. allowed the dressing of meat in families, inns, cook shops or victualling houses, and the crying of milk on a Sunday in the morning and evening.

The "necessity" intended is "not a personal necessity, but one arising out of the nature of the thing to be accomplished and the need of the community." Poverty and the need of money is no excuse for working on the Sabbath. What a farmer may do in one State he may not do in another; and what he may or may not do is sometimes very doubtful.

In Indiana a man may lawfully feed his hogs on Sunday; and, if according to the practice of good husbandry, it be necessary for him to gather the feed in the field and haul it to the feeding place on that day, he may do it all without incurring any pains or penalties.[17] An honest yeoman may gather in his grain on the Sabbath day, if by leaving it in the field until Monday it is likely to be spoiled.[18] In that State, too, he can pick and haul to market his water melons—as a work of necessity—if otherwise they would spoil.[19] (The need of the community for water melons must be great!) It appeared from the evidence in this case that Wilkinson was prosecuted for drawing a load of 100 melons to market on a Sunday. On that day he had over 600 dead ripe and ready for market, and he lost all except the one load he marketed. Judge Hawk, in giving judgment on an appeal from the conviction for Sabbath-breaking, said: "It would seem that a kind Providence had crowned the labors of the appellant with a bountiful harvest of melons. They were ripening and decaying much faster than he could get them to the market, twenty-six miles off." The learned judge then gave his ideas on water melons and works of necessity: "A ripe water melon in its season is a luxury; but there is nothing more stale, flat and unprofitable than a decayed or rotten melon. It seems to us that it was his duty as a prudent and careful husbandman to labor diligently to get as many of his melons as he could to market. Whatever was his duty to do in the premises, there was a moral necessity for him to do; and in the accomplishment of the main purpose of saving and securing the benefits of his crops, whatever labor he was reasonably required to do on Sunday, must be regarded, as it seems to us, a work of necessity." The judge further remarked: "It is no desecration of the Sabbath to garner and secure on that day the fruits of the earth, which would otherwise decay and be wasted. It is not necessary for the protection of the Sabbath that men should abuse or overwork either themselves or their horses by midnight work."

Yet down in Arkansas (see above as to some of the provisions of their Sunday laws) there was a poor farmer named Goff, whose wheat was wasting from over ripeness; but he had no cradle wherewith to cut it, and he waited to borrow one until Saturday night, as his poverty compelled him to work for his neighbors during the week. On Sunday he cut his own grain with the borrowed implement. The court decided that there was no general necessity that wheat should be cut on Sunday, therefore no one might do it, and that the poor man was not justified in breaking the Sabbath.[20] The disciples of the Man of Nazareth, who not only gathered, but also threshed the wheat for their daily bread on the Sabbath day, would have had small chance of an acquittal before this court; as little chance as any of them would have had if he had been in the poor shoemaker's boots in Massachusetts. This wretched mortal had a garden patch where ill weeds had grown apace. For days he could not get away from his master's shop; at last he got a two days holiday—Friday and Saturday. He worked hard at his crops, even by moonlight, until late on Saturday night. When he ceased a few hills remained unfinished, in a very bad condition, and suffering from want of hoeing. On Sunday morning about eight o'clock, he spent half an hour in finishing these hills of corn. He was convicted for breaking the Sabbath, and the court, on appeal, sustained the conviction.[21] The judges in this case must have belonged to that school of the Rabbis which insisted that it was a sin to eat an egg laid upon the seventh day; or have been lineally

16 Scottish Law Magazine, 1880.
17 Edgerton v. State, 67 Ind. 588.
18 Turner v. State, 67 Ind. 595.
19 Wilkinson v. State, 59 Ind. 416.

20 State v. Goff, 20 Ark. 289.
21 Commonwealth v. Josselyn, 91 Mass. 411. See, also, Commonwealth v. Sampson, 97 Mass. 407.

descended from the members of the Kirk session of Humbie, who cited poor Margaret Brotherstone before them "for that she did water her kaill upon the Sabbath day," and ordered her, she having confessed her sin, "to give evidence in public of her repentance the next Lord's day." [22]

In Indiana (and even in Vermont, although the latter State is very near the unco' guid of Massachusetts) the courts have considered that the collecting and the boiling down of maple sap is a work of necessity on Sunday where the sap is flowing freely and all the troughs are full; the maple sugar man having no way of saving his harvest save by emptying the troughs that are full.[23]

Again, in liberal Indiana, the brewer is allowed to turn or handle the barley which he is manufacturing into malt for his beer, as twenty-four hours neglect would make it unfit for use. The turning is a work necessary to accomplish the object which the brewer has in view, and as the law authorizes the manufacture of beer, the labor necessary to make it is lawful and a work allowable on Sunday.[24]

In Ohio it was held that under special circumstances a miller might grind on that day. The judge said he thought it would hardly be questioned that a gas company might supply gas, a water company water, and a dairyman milk to their customers on that day; for it is no part of the design of the law to destroy or impose ruinous restrictions upon any lawful trade or business.[25]

Again, in Indiana, an inn-keeper sold cigars from a stand which was a part of his establishment, and the court held that he was not punishable. The judge said: "There is a daily necessity for putting a house in order, cooking meals, drinking coffee or tea, smoking a cigar by those who have acquired the habit, or continuing any lawful habit on Sunday, the same as there is on a work day, and whatever is necessary and proper to do on Sunday to supply this constant daily need is a work of necessity within the meaning of the law. It is not unlawful to keep a hotel on Sunday in the same way that it is usually kept on a week day, and if a hotel keeps a cigar stand, which is a part of its establishment, from which it sells cigars to its guests, boarders and customers on a week day, to sell cigars from the same stand in the same way on Sunday is not unlawful. There is no difference legally between the act of selling a cigar under such circumstances and the act of furnishing a cup of tea or coffee, a meal of victuals, or supplying any other daily want to a customer on Sunday for pay." [26] Smokers, therefore, can not complain.

In Alabama, as in Ontario, all shooting is forbidden if it is not justified by necessity, and shooting a dog in mere mischief is not a necessity.[27] In Missouri, however, a man went out hunting on Sunday. He was prosecuted, but acquitted as the law only forbade working on the Sabbath day; the district attorney argued that "hunting" was "working," but the judges could not see it in that light. [28]

In Massachusetts it has been held that cleaning out a wheel-pit on Sunday, to prevent the stoppage of mills employing many hands, is not a work of necessity within the meaning of the law. Nor can one who helped at this work as a matter of kindness protect himself by claiming that what he did was a work of charity.[29] No wonder, when the law is such, that the poet wrote: "Alas for the rarity of Christian charity, under the sun."[30] —*Canada Law Journal.*

22 3 Buckle, civ. ch. iv., note 182.
23 Morris v. State, 31 Ind. 189; Whitcomb v. Gilman, 35 Vt. 297.
24 Crockett v. State, 33 Ind. 416.
25 M'Gatrick v. Wason, 4 Ohio St. 566.
26 Carver v. State, 69 Ind. 61.
27 Smith v. State, 50 Ala. 159.
28 State v. Carpenter, 62 Mo. 594.
29 M'Grath v. Merwin, 112 Mass. 467.
30 See, also, on above subject, Seaman v. Commonwealth, 21 Am. Law Reg. (N. S.) 256.—ED. Canada L. J.

CONTRACT—INSURANCE — WAIVER OF STIPULATION.

BENNECKE v. CONNECTICUT MUTUAL LIFE INS. CO.

Supreme Court of the United States, March 13, 1882.

A waiver of a stipulation in an agreement, or the ratification by a principal of unauthorized acts of an agent, to be effectual must not only be made intentionally, but with a knowledge of the circumstances.

In error to the Circuit Court of the United States for the Southern District of Illinois.

This was an action of assumpsit brought by Amelia Bennecke, plaintiff in error, who was also

plaintiff in the court below, to recover of the Connecticut Mutual Life Ins. Co. the sum of two thousand dollars upon a policy of life insurance.

The parties having waived a jury, the issues both of fact and law were submitted to the court, from which the following facts appeared: On January 29, 1878, Adolphe Benneke procured from the Connecticut Mutual Life Ins. Co., through John Ansley, its agent at Bloomington, Illinois, a policy of insurance on his life for $2,000, for the benefit of Amelia Bennecke, his wife. It was an ordinary life policy, and contained, among other conditions, the following: "3d. That the said insured is, under this policy, freely permitted to reside in any civilized abode in the western hemisphere, lying north of the thirty-second parallel of north latitude in the United States, and lying south of said thirty-second parallel, excepting from the first day of July to the first day of November, and in the eastern hemisphere lying north of the forty-second parallel of latitude and west of the fortieth meridian of longitude east from Greenwich, and he may also pass as a passenger by usual routes and means of public conveyance to and from any port or place within the foregoing limits, but if he shall, at any time during the continuance of this policy, pass beyond or be without the foregoing limits without the consent of this company previously given in writing in each or either of the foregoing cases, then this policy shall become and be null and void. 4th. That in every case in which this policy shall cease and determine, or shall be or become null and void, all premiums paid in respect to the same shall be forfeited to the company."

After the signatures of the secretary and vice-president of the company, and on the margin at the bottom of the policy, appeared the following: "Agents of the company have no authority to make, alter or change any condition of the policy, nor to waive forfeiture thereof."

The annual premium of forty-six dollars and twenty-four cents required by the terms of the policy was duly and fully paid. Bennecke left his home at Bloomington, Illinois, on September 26, 1878, and went to New Orleans, Louisiana, which is south of the thirty-second parallel of latitude, without the consent of the insurance company first obtained. He remained there until October 15, 1878, when he died at the hospital Hotel Dieu, in that city, of yellow fever. Ansley had been agent of the Connecticut Mutual Life Ins. Co., at Bloomington, Illinois, from 1863 up to and including October, 1878. On October 16, 1878, he first heard that Bennecke had gone to New Orleans. On October 17 Ansley called on Haker, the assured's brother-in-law, told him that he had heard that Bennecke was then in New Orleans; that on account of this violation of the condition of the policy his insurance was forfeited; that a southern permit costing twenty dollars should be paid for, and advised him to pay it for Bennecke. Haker at first said he knew nothing about it and refused to pay the twenty dollars. He then said he would look into the matter. The same day, after a consultation with Mrs. Bennecke, Haker went to Ansley's office, and paid him twenty dollars, and took from him a receipt as follows: "Agency at Bloomington, Illinois, Oct. 17, 1878. $20. Received of Christ. Haker, twenty dollars, being the amount required for a southern permit on policy of Adolphe Bennecke in the Connecticut Mutual Life Ins. Co., of Hartford, Conn., No. 52,242. Amount of policy, $2,000. John Ansley, Agent."

At the time of taking this receipt, neither Haker nor Ansley, nor Bennecke's wife or friends, knew that Bennecke was dead. On receiving the twenty dollars from Haker, Ansley forwarded the money to Stearns, Dickinson & Co., the State agents of the insurance company, at Chicago, Illinois, and they acknowledged the receipt of the money by letter. Ten dollars per thousand was the customary price fixed by the company as the extra premium for a permit to go south of the thirty-second parallel between the first of July and the first of November. Ansley recollected having received money for three or four such permits, possibly more, at that rate. In such cases he simply received the money for the permits, forwarded it to the State agents of the insurance company, at Chicago, and requested them to get permits from the insurance company at Hartford, Connecticut, and send them to him for delivery. The letter in which he enclosed the twenty dollars received from Haker to the agency at Chicago, was as follows: "Agency at Bloomington, Oct. 17, 1878. Messrs. Stearns, Dickinson & Co. Gents: Herein please find draft for $20, less ex., for which please get and send me a southern permit for A. Bennecke, insured by policy 52,242; amount $2,000. He went to New Orleans about ten days ago, and will probably remain there during the balance of the month. Please give this immediate attention, and get permit here as soon as possible. This twenty dollars paid this day. Yours truly, John Ansley."

Ansley never received a permit from the insurance company for Bennecke. On the sixth of November, 1878, Ansley having become satisfied that Bennecke was dead at the time the twenty dollars was paid him for the permit, of his own motion took twenty dollars of other money belonging to the company and tendered it to Haker, stating that Bennecke was dead at the time the money was paid as a reason for tendering the money to him. Haker refused to receive the money. Ansley had no authority to issue policies of insurance on the company, but after the policies were issued, he turned them over to the parties on payment of the premium. Ansley received no word from the company or State agents about Bennecke's death up to the time he tendered the money back to Haker. On the 26th of October he addressed a letter to the State agents of the insurance company, at Chicago, in which he informed them that Bennecke had died on October

17, in New Orleans, of yellow fever From all that appears this was the first information received by them of Bennecke's death.

Ansley knew what was the price required for a permit, and had never applied for one without getting it. But he never applied for one when yellow fever was prevailing in the forbidden region. Proofs of loss, dated the 6th of December, 1878, were furnished the insurance company. The defendant company on the trial offered to return the money received by Ansley for the permit.

Suit on the policy was begun in the Circuit Court of McLean County on the 18th day of April, 1878, by a declaration on the policy of the insurance. Defendant filed a plea of the general issue only. On the petition of the defendant the case was transferred to the Circuit Court of the United States for the Southern District of Illinois. It was admitted by the insurance company that there was no other defense in the case than what arose from the forfeiture of the policy by reason of the fact that Bennecke had gone south of the thirty-second parallel of latitude between the 1st of November, without the consent of company previously given in writing; and on the foregoing facts it occurred as a question whether the forfeiture had been waived by the company, on which question the judges were opposed, and the presiding judge being of opinion that the forfeiture had not been waived, judgment was entered for the defendant. Whereupon, and on motion of the defendant, by its counsel, it was ordered that the state of the pleadings, and the facts found, and the question on which the judges differed, be certified according to the request of the defendant, and the law in that case made and provided, to this court to be finally decided.

The cause has accordingly been brought to this court by certificate of division of opinion and writ of error.

Mr. Justice WOODS delivered the opinion of the court:

It is not disputed by plaintiff in error that upon the facts found the policy of insurance had been forfeited. It is not insisted that there was any formal waiver of the forfeiture by any agent of the defendant in error, or that any permit was ever issued by the company to Bennecke, from which such waiver could be inferred. But plaintiff in error contends that the receipt by Ansley, the agent of the insurance company at Bloomington, on October 17, after the forfeiture of the policy, of the sum usually charged for a permit to reside south of the thirty-second parallel between the first of July and the first of November, the sending of the money by him on the same day to the agents of the company at Chicago, its receipt by them, and the fact that they had never returned the money to the person by whom it was paid, are sufficient to establish a waiver by the company of the forfeiture of the policy. It does not appear from the findings of fact made by the court that either Ansley, the agent at Bloomington, or Stearns, Dickinson & Co., the agents at Chicago, had any direct authority to waive a forfeiture. But, even if it were shown that they had such authority, and had waived the forfeiture, or that the company itself had waived it, the waiver would not, under the circumstances of this case, be binding on the company.

A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule when there is a direct and precise agreement to waive the stipulation. *A fortiori* is this the rule when there is no agreement either verbal or in writing to waive the stipulation, but where it is sought to deduce a waiver from the conduct of the party. Thus, where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for a written agreement, he must clearly show, not merely his own understanding, but that the other party had the same understanding. Darnley (Earl) v. L. C., etc. R. Co., L. R., 2 H. L. 43.

The same rule applies to the ratification by the principal of the unauthorized acts of his agent. "It is perfectly well settled that a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistake or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of the agent." Combs v. Scott, 12 Allen, 496. And it has been declared by this court that "no doctrine is better settled, both upon principle and authority, than this: that the ratification of an act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded on mistake or fraud." Owings v. Hale, 9 Pet. 607; see, also, Diehl v. Insurance Co., 58 Pa. St. 452; Bevin v. Conn. Mutual Life Ins. Co., 23 Conn. 244; Viall v. Genessee Mut. Ins. Co., 19 Barb. 440.

There is no pretense in this case that the insurance company was advised of the material facts, when its supposed waiver and ratification of the acts of its agent took place. The contention of the plaintiff in error is that the insurance company waived a forfeiture of the policy when it was totally ignorant that any forfeiture existed. And the waiver of the forfeiture is deduced from a permit which is itself deduced from the fact that an agent, himself ignorant of the material facts, agreed to apply to the company for the permit, and received and forwarded the money to pay for it.

The very purpose for which a permit was asked shows that both parties were ignorant of the facts which it was necessary the company and its agents

should understand before any effect could be given to its alleged waiver of the forfeiture. Permission was asked that Bennecke might reside and travel south of a certain parallel. This implied that he was living and able to travel. But the findings show he was dead when the permit was applied for. If the company had given him a formal permit in writing to reside and travel south of the thirty-second parallel, he being dead at the time, and the company ignorant of the fact, it would be a complete *non sequitur* to hold that this amounted to a waiver of a forfeiture of the policy unknown to the company, and consequent upon his doing the act for which a permit was asked, and which was in violation of a condition of the policy.

The case may be thus stated. The right of the plaintiff in error to a recovery rests on a waiver by the insurance company of the forfeiture of the policy. But there has been no direct waiver. The waiver is deduced from the permit. But there has been no formal permit. The permit is inferred from the fact that Ansley, a local agent, who had no knowledge of the death of Bennecke, applied for a permit to other agents who were also ignorant of the death of Bennecke, and remitted to them the money therefor which they retained, but which Ansley tendered back, using for the tender other moneys of the company; the company itself, the principal of these agents, being all the time ignorant that Bennecke had forfeited his policy by a violation of its conditions, or that he had died in consequence of such violation, or that after his death a permit to allow him to reside and travel in that forbidden region had been applied for, or that any money had been handed to its agent to be paid over as the consideration for such permit.

The case of the plaintiff in error is not aided by the facts found by the court in relation to the retention by the agents of the company of the money paid for the permit. It is unnecessary to decide what inference might be drawn if the company or its agents, with full knowledge of the death of Bennecke, had retained the money and never tendered it back. It does not appear that Ansley was informed of the death of Bennecke until October 26. On November 6, eleven days thereafter, he tendered back to Haker the money advanced by him to pay for the permit. Under the circumstances of this case we do not think this lapse of time sufficient to show that Ansley intended to waive the forfeiture of the policy, even if he had been clothed with authority to do so. If the company was bound by the act of Ansley in receiving the money for the permit, it was entitled to the benefit of his act in tendering it back. One tender was sufficient. That made by Ansley was never disavowed by the company. On the contrary, the company renewed it upon the trial of the cause in the circuit court. Under the circumstances of this case, the contention that the insurance company waived the forfeiture of the policy is without support.

The judgment entered in the circuit court in favor of the defendant, in accordance with the opinion of the presiding justice, was, therefore, right, and must be affirmed.

CONTRACT — REPAYMENT OF LICENSE FEE UNLAWFULLY EXACTED.

TOWN OF COLUMBIA CITY v. AUTHUR.

Supreme Court of Indiana, June 20, 1882.

A contract between a liquor dealer and a municipal corporation that money paid for a license under an ordinance of the municipality shall be refunded in case the ordinance should prove invalid is not unreasonable and should not be held invalid, although if the money had been voluntarily paid without such stipulation it could not be recovered.

Appeal from the Whitley Circuit Court.

In this action Philip Authur complained of the Town of Columbia City, and charged that on the 8th day of June, 1878, said town passed an ordinance providing that it should be unlawful for any person to barter, or sell, within the incorporated limits of such town, any spirituous, malt, vinous or intoxicating liquors in a less quantity than a quart at a time, without first paying to said town the sum of fifty dollars, and obtain therefrom a license so to do; that the plaintiff was at the time engaged in the business of selling spirituous, malt, vinous and intoxicating liquor by retail, within the limits of such town, under a license from the Board of Commissioners of the County of Whitley, granted to him at the March term, 1878, of said board; that, on said 8th day of June, 1878, Henry Snyder, John Fanpert, Wm. Sinche, George Stenhoff, Isaac Pritchett and Jacob Wonderlick, were the duly elected, qualified and acting trustees of said town, and so continued until the 2d of May, 1879; that, at the passage of said ordinance, there were in all fifteen persons engaged in the sale of intoxicating liquors by retail within the territorial limits of said town, all of whom disputed the right of such town to require of them the sum of fifty dollars each, or any other sum, as a license fee for the privilege of selling intoxicating liquors within such territorial limits, and refused to pay the sum so severally required of them for the privilege of selling intoxicating liquors within said town; that the defendant, acting through its said trustees, threatened to sue the plaintiff and all others engaged in the sale of intoxicating liquors within its limits, if he and they did not severally pay a license fee and procure a license, as required by said ordinance; that at a lawful meeting of the trustees of said town, held on the 15th day of June, 1878, the plaintiff, being present, said trustees acting on behalf of said town, proposed to the plaintiff that if he would pay said license fee of fifty dollars, and it should be decided by the Supreme Court of the State that said town had no authority to pass such an ordinance as that which

had been passed as above stated, or if said town should fail to collect the license fee demanded by said ordinance from any of the other persons similarly engaged in the sale of intoxicating liquors within its limits by reason of the want of authority in said town to charge or collect such a fee, then said town would repay to the plaintiff said sum of fifty dollars, with interest; that said trustee, then and there represented to the plaintiff that if he did not pay the said sum of fifty dollars, they, acting for said town, would commence legal proceedings against him to collect the sum, and would prosecute him for a violation of said ordinance; that, by paying said sum, the plaintiff would avoid all such expense, trouble and litigation, and secure a return of the money in the event that said Supreme Court should decide that he was not liable to pay the sum; that said trustees at the same time further represented that they would enter their said proposition to the plaintiff of record as a part of the proceedings of their said meeting; that, relying upon said proposition of said trustees, and believing that said town would carry out the agreement so proposed by the trustees, and that the same had been entered of record as a part of their proceedings, and being induced solely by the proposition of the trustees, and to avoid litigation with said town, and prosecution for a violation of said ordinance, the plaintiff, on the 21st day of June, 1878, paid the sum of fifty dollars to the treasurer of said town as a license fee for the sale of intoxicating liquors, that said trustees afterwards commenced action against James B. Edwards and William Walter respectively, both of whom were engaged in the sale of intoxicating liquors within said town, and both of whom had refused to pay the license fee demanded by said ordinances to enforce the provisions of the ordinances against them, which action resulted in a decision by the Supreme Court of this State, that said town had no authority to pass said ordinance or to demand a license fee of said Edwards or Walter, or of any other person engaged in the same business in said town; that immmediately before the term of the trustees of said town hereinabove named expired, they caused to be entered of record a statement as follows: "The following statement shows to the board of trustees the condition under which the town liquor license has been paid to said town. The board of trustees promised and agreed with liquor sellers who have paid their town license, that in case the town should fail to recover judgment in the cases being now adjudicated upon in the circuit court, then the board of trustees were to refund the license fee to each of those persons who have already paid said license. The board feel themselves under obligations to refund the license to those who have paid their license, as in several cases they feel themselves individually under obligations for the repayment of such license fees. The board takes this method of calling the attention of the newly elected board to this matter, hoping they may see fit to carry out the intention of the old board in their adjudication upon this subject. That repayment of the money so paid by the plaintiff as a license fee had been demanded and payment refused." Wherefore, the plaintiff demanded judgment for the sum of $50, with interest from the 21st day of June, 1878. A demurrer to the complaint being first overruled, the defendant answered in 9 paragraphs. The first was in general denial, and the rest contained what was claimed and intended to be special matters in defense. On the plaintiff's motion, all the paragraphs of the answer, except the first, were struck out, and a jury returned a verdict for the plaintiff, assessing his damages at $53.

A motion for a new trial being first denied, the plaintiff had judgment on the verdict. Questions were made here upon the sufficiency of the complaint, upon striking out parts of the answer as above stated, and upon the refusal of the court to grant a new trial. It is argued with much zeal and at great length on behalf of the appellant, that the alleged contract entered into between the appellant's trustees and the appellee, by which the license fee demanded was to be returned in certain contingencies, was a contract which the trustees had no authority to make; that all the proceedings of the trustees had in connection with such alleged contract were *ultra vires* and void; that incorporated towns are not permitted to contract debts by such methods, by reason of restrictions imposed by their charter, and from considerations of public policy, and that with all concerning such alleged contracts eliminated from the complaint it was palpably bad upon demurrer as showing a merely voluntary payment under circumstances which did not authorize the appellee to demand a return of the amount paid. The case presented by the complaint is a novel one, and one concerning which we are unable to devise much assistance from any decided case to which our attention has been directed, but we are unable to see any good reason for holding that the complaint was insufficient. In view of all the circumstances attending it, the alleged agreement between the trustees and the appellee was not an unreasonable one, and, we think, ought not to be held an invalid one. It was such an agreement as rational persons, as well as corporate bodies, might well make in their transactions of their ordinary business, and its probable effect was to prevent the expense of litigation.

It was not the creation of a debt against the city in the ordinary sense in which that phrase is used. It was but the transaction of the current and incidental business of the corporation, from which a liability might result dependant upon events which the trustees could not control.

The within memorandum which the trustees afterwards made as to the terms upon which the appellee and others paid the license fee demanded, was quite informal, but it constituted, when entered, a record of a contract obligatory upon the town, and confirmatory of the oral contract

under which the appellee paid the money sued for in the action. While there may have been some surplusage in the complaint, its averments fairly construed made a case of the payment of money unlawfully demanded upon a special contract for its repayment in certain contingencies and not a case of merely voluntary payment, as insisted upon by the appellant. In our opinion therefore the court did err in overruling the demurrer of the complaint.

The paragraphs of answer struck out by the court were very voluminous, and the view we take of their general scope and character renders it unnecessary that we shall notice them in detail. No question was raised by any of them which appears to us not to have been raised by the demurrer to the complaint and by the evidence adduced at the trial. We do not consequently see that any injury resulted to the appellant from the striking out of those paragraphs, nor can we say that the substantial averments of the complaint were not sustained by sufficient evidence.

Some question is made upon instructions given and refused, but what we have said upon the sufficiency of the complaint practically disposes of all the material questions presented by this appeal.

The judgment is affirmed with costs.

COMMON CARRIER— PASSENGER STANDING ON PLATFORM OF CAR— CONTRIBUTORY NEGLIGENCE — DUTY OF CARRIER TO PROVIDE SEAT.

CAMDEN, ETC. R. CO. v. HOOSEY.

Supreme Court of Pennsylvania, February 20, 1882.

A, a passenger upon a railroad train, was unable, in consequence of the crowded condition of the cars, to obtain a seat. Although there was standing room inside he placed himself on or near the edge of the outside platform, and rode there for some distance, with his back against the end car window, holding on by an iron rail affixed to the car. While in this position a jolt occurred, by which he was thrown upon the track and injured. Suit having been brought by him against the company to recover damages for the injury done him: *Held*, that the court should have peremptorily instructed the jury that the plaintiff had been guilty of such contributory negligence as to defeat his right of recovery.

Error to the Common Pleas No. 1, of Philadelphia County.

Case, by John Hoosey, against the Camden, etc. R. Co., to recover damages for injuries alleged to have been occasioned by the negligence of the defendant company's servants. Plea, not guilty.

At the first trial (before Biddle, J.) a nonsuit was granted, which the court in banc subsequently took off. At the second trial (before Peirce, J.) the plaintiff showed that on August 28, 1878, he, in company with the St. Ann's Temperance Society, went on an excursion over the defendant's road to Atlantic City. On the down trip there were seats for all the excursionists, but on the return trip the train was overcrowded. The plaintiff testified: "I got on the train after it had started from the excursion house; was about one hundred and fifty yards from excursion house, may be more." The remainder of the plaintiff's testimony, showing that, failing to obtain a seat, he went upon the platform, is sufficiently stated in the opinion of the court.

About midway between Atlantic City and Camden, being thus upon the platform, he was thrown off by a jolt, and met with such injuries as rendered necessary the amputation of an arm. One of the clergy in charge of the excursion testified that the plaintiff had evidently been drinking, but denied that he was drunk.

The person who found him lying on the roadside, the physician, and the druggist who attended him afterwards, all testified that he was very drunk. The train consisted of twenty cars; no one else was injured.

The defendant requested the court to charge, *inter alia*. 3. That, apart from any rule or notice upon the subject, it is negligence in a man of full age to stand upon or cross a platform of a car in rapid motion upon a steam railroad. Answer. I affirm, unless compelled by circumstances to do so. 4. That, even if the jury believe that the object of the plaintiff in going out upon the platform, from which he fell, was to seek a seat in another car, and the car from which he had gone contained no vacant seat, still it would have been negligence on his part to pass out upon the platform while the cars were in motion, so long as it was possible for him to remain standing in the car which he left. Refused. 9. That the evidence shows negligence on the part of plaintiff which contributed to produce the injury complained of, and therefore he can not recover. Answer. I decline; it is for the jury to determine if there was any contributory negligence on the part of plaintiff.

The court charged, *inter alia*, as follows: "It is a general rule and principle of law that negligence on the part of the defendant, without contributory negligence on part of plaintiff, entitles him to recover. The law does not measure any amount of negligence necessary to make out a case of contributory negligence, but recognizes all degrees alike, and this is for you to say. Take the case, and decide to the best of your judgment."

Verdict for plaintiff for $2,000, and judgment thereon. Defendant thereupon took this writ, assigning for error, *inter alia*, the above answers to their points.

Henry B. Freeman and *Geo. M. Dallas*, for plaintiffs in error; *E. A. Anderson* and *Francis E. Brewster* (*John H. Fow* with them), for defendant in error.

STERRETT, J., delivered the opinion of the court:

The single breach of duty with which the de-

fendant below was specifically charged, as the only ground of liability to the plaintiff for the injury he sustained in falling off the platform of the car on which he was then standing, was the failure of the company to provide a sufficient number of cars to seat all the passengers on the train.

Without assenting to the broad proposition contended for, that a railroad company using steam motive power is bound absolutely, and under all circumstances, to provide every passenger on the train with a seat, it can not be questioned that, as a general rule, and under ordinary circumstances, it is the duty of such company to provide suitable car accommodations and seats for those whom it undertakes to carry: and if a passenger, exercising reasonable care and prudence, is injured in consequence of the company's neglect of duty in that regard, the latter is liable to respond in damages for the injury thus occasioned solely by its own negligence. There appears to be nothing in the circumstances of this case to exempt the company from that general rule of duty; and if its negligence was the proximate cause of the plaintiff's injury, the liability of the company would necessarily follow, unless the plaintiff himself was guilty of negligence which contributed thereto. His contention was that, in common with many other passengers, he was unable to procure a seat, and while searching for one he was thrown from the platform of one of the cars, and thus sustained the serious injury which resulted in the loss of his arm. The overcrowded condition of all the cars composing the train, and the consequent inability of the plaintiff and others to procure seats were facts clearly proven.

Assuming for the present that the company was justly chargeable with negligence resulting in injury to the plaintiff below, and that, under the circumstances, he was not guilty of contributory negligence in passing from car to car in search of a seat while the train was in rapid motion, can it be pretended that it would not be gross negligence in him to voluntarily take a position near the outer edge of the platform, and remain there until, by an ordinary jolt of the car, he lost his equilibrium and was thrown off? This is precisely what the evidence as to the plaintiff's position at the time of the action clearly establishes. Apart from his own testimony there is very little evidence tending to show precisely where he was at and shortly before that time, and there is certainly nothing that militates against his own version of what then and there occurred. He testified, in substance, that on entering the cars at Atlantic City, and finding the rear one overcrowded, he pushed his way forward, searching in vain for a seat, until he reached the front car. After remaining there a short time he started back; and, quoting from his own testimony, as found in the bill of exceptions, he says: "I left that car because I was tired standing there; had been there seven or eight minutes; started back through the cars, and went through some ten or twelve cars; stopped several going through; can't recollect the time it took to go through back; could not get through for crowd; it was pretty near the same going back as coming through; I stopped outside on platform; rear platform of fourth or fifth car, right outside the door; stood on one side; the right-hand side coming up. When I got out first, I had hold of a little rail or something across the window; I held on to the little rail across the window to keep from falling off; let go to go through the cars; I was standing there a minute or two, or so; it was two minutes to the best of my knowledge; can't tell if it was longer; when I left I started to go through, when the car got a jolt and somebody struck me; could not count how many passengers passed through while I was on the platform; they were coming in the opposite direction, up towards the engine, and some were going through the same way, towards the rear of the train; can't say whether the car door of the car I passed out of was open; when I went out of the door of the opposite car I am positive sure, was open; saw parties coming from the opposite car; I did not stand aside inside of car, because I could not see them well, because I wanted to go through myself; I came out and stood with my back against the car and hand on the rail, resting myself; I was leaning with my back against the car and my hand behind me; people were passing through into the car I left; there was a crowd; I left that car to go into an adjoining car; while standing there the car got a jolt, and somebody behind me struck me and staggered me; the jolt and it had something to do with it; can't tell whether the jolt without the other would have thrown me off; as soon as I got the jolt I made a grab with my right hand and missed, and caught with the left the rail on the platform; there is a similar rail on the body of the car to assist people on or off; I tried to get hold of the rail on the body; I was thrown partly around, and caught the dasher rail with my left hand; I was thrown with my chest towards the inside track; train was traveling very rapidly; my arm was mangled."

It was very evident, from the plaintiff's own statement, that at the time of the accident, and for some minutes before, he was not in the act of passing from one car to another in search of a seat. On the contrary, he was standing quite near the edge of the platform with his back to the end window of the car. He was not only in the position of known danger, but was there voluntarily and in disregard of the rules of the company. There is nothing in the testimony from which a jury would be justified in coming to any other conclusion. While he was thus standing on the platform, persons passed from one car to the other in both directions, and there is nothing whatever to show that he could not have gone into the next car if he had been so disposed. Neither he nor any other witness pretends to say it was necessary for him to stop and stand on the platform.

In the seventh point of the defendant below, the

court was requested to charge: "That even if a search for a seat was the real purpose of the plaintiff in going out on the platform, and if it were not negligence for him to have crossed from car to car for that purpose, yet, if the jury believes from the evidence that he lingered on the platform instead of immediately crossing, the verdict should be for the defendant." The learned judge, in affirming this proposition, added the qualifying words: "Unless compelled thereto by circumstances." The jury was then authorized to inquire whether or not the plaintiff was compelled by circumstances to linger on the platform. We see nothing in the testimony to warrant the submission of this inquiry to the jury. As already intimated, there was not a particle of testimony from which it could be reasonably inferred that plaintiff was compelled to take or retain the position he did on the platform. Having shown by his own testimony that, at the critical juncture, he was in a position where no one of ordinary prudence should have placed himself, it was incumbent on him to prove that he was there from necessity and not from choice. While the latter was clearly shown, there was no testimony tending to prove the former. The point should have been affirmed without the qualification complained of; but, for reasons already suggested, we think the court should have gone further and instructed the jury as requested in the defendant's ninth point, which was: "That the evidence shows negligence on the part of plaintiff, which contributed to produce the injury complained of, and therefore he can not recover,"

The dangerous position on the platform in which the plaintiff voluntarily placed himself while the cars were in rapid motion, was undoubtedly the immediate cause of his being jolted off. If there had been any testimony from which it could have been reasonably inferred that he was there from necessity and not from choice, it would have been a question for the jury; but, in the absence of such evidence, it was error to refuse the point and leave it to the jury to determine whether he was or was not guilty of contributory negligence.

Of all the passengers on a long train of twenty overcrowded cars, the plaintiff was the only one who appears to have been injured. If he had submitted, as many others did, to the inconvenience of standing inside the cars, or if he had been guilty of no greater imprudence than passing from car to car while the train was in rapid motion, it is not at all probable he would have been injured. His much to be regretted misfortune was the result of his own carelessness. This was clearly proved by uncontroverted testimony from which no other conclusion could reasonably be drawn.

Judgment reversed.

MERCUR, GORDON and TRUNKEY, JJ., dissent.

WEEKLY DIGEST OF RECENT CASES.

1. ADMINISTRATION—PURCHASER AT EXECUTOR'S SALE—PRESCRIPTION.

1. The fact that a court of probate has made an order for the sale of a testator's estate, is, of itself, an adjudication that all the facts necessary to give it jurisdiction to make the order really existed. 2. The deed of an executor conveying property sold by order of a probate court under which possession had been held for over sixty years, and which recites that the sale was made "after the publications and delays prescribed by law," and the account of the executor of record in the probate court for fifty years, which shows that he had paid a specified sum for advertising the sale of the property conveyed, are competent as evidence to prove the advertisement of the sale, and being uncontradicted are sufficient to establish the fact. 3. To entitle one to claim the benefit of the prescription applicable to immovables, the jurisprudence of Louisiana requires that he should have obtained the property prescribed for in good faith and by a just title; that is to say, a title derived from one whom the possessor believed to be the true owner, and which, by its nature, was sufficient to transfer the ownership if it had in fact been derived from the true owner. 4. The prescription of five years declared by art. 3543 of the Civil Code of Louisiana against all informalities connected with or growing out of any public sale by any person authorized to sell at public auction, may be pleaded by one who purchases in good faith at the sale of an executor or register of wills, and who holds by a just title, against the averment that the sale was not advertised, that the inventory of the estate was not completed before the order of sale was made, or that it was partly made by appraisers appointed by the testamentary executor, or that it was signed by only one of the two appraisers so appointed. Such informalities are cured by the lapse of five years. *Davis v. Gaines*, U. S. S. C., October Term, 1881, 3 Morr. Trans. 299.

2. ADMIRALTY— FEE OF SHIPPING COMMISSIONER.

The exemption allowed by sec. 4513 of the Revised Statutes of the United States from the fee of two dollars allowed the shipping commissioner for services in shipping crews, extends to a reshipment on all voyages succeeding in regular order the one for which fees are paid, and is not limited to the one next succeeding. *Young v. American Steamship Co.*, U. S. S. C., March 13, 1881, 4 Morr. Trans. 273.

3. BANKRUPTCY—PROCEDURE—APPEALS.

1. Rule 26 of the orders in bankruptcy of this court, requiring appeals by a creditor from a decision of the district court rejecting his claim to be filed in the circuit court within ten days after being taken, is not in conflict with sec. 8 of the original bankrupt law, or if it is, is validated by sec. 4990 of the Rev. Stats. of the United States. 2. Hence, an appeal taken from a decision of the district court during a term of the circuit court which lasted for several months afterwards, should have been entered in the circuit court during that term, within ten

days after being taken; and it was too late to wait till the commencement of the succeeding term. *Ex parte Woolen*, U. S. S. C., October Term, 1881, 3 Morr. Trans. 346.

4. BOND OF COUNTY TREASURER—SURETIES.
A county treasurer who had been elected three successive terms proved to be a defaulter. Suit was brought by the county on his third bond. *Held*, 1. That the sureties might prove that the entire defalcation was committed before the giving of the bond sued on and before the commencement of the term of office covered by it, in which case they would not be liable. 2. That statements made by said treasurer to the board of county commissioners of the amount of money on hand at the commencement of the third term of office were not conclusive upon the sureties, nor were they estopped from denying, impeaching or contradicting the same. *Van Sickel v. Buffalo County*, S. C. Neb., June 22, 1882, 13 N. W. Rep. 19.

5. CONTRACT—ACCEPTANCE OF GOODS SHIPPED.
N, under an agreement with M B, by which he was to receive certain goods from them, sent his order therefor. Being unable to furnish the goods at that time, M B handed the order to C & P, dealers in such goods, to fill, which they did in their own names, shipping them as directed in the order to N, and at the same time informing him of the price and terms of payment to be made to them. *Held*, that by the acceptance of the goods under these circumstances, the law implied an agreement on the part of N to pay for them according to the terms upon which they were delivered to him. *Neidig v. Cole*, S. C. Neb., June 21, 1882, 13 N. W. Rep. 18.

6. CONTRACT—GRANT BY STATE OF WATER PRIVILEGES ON CANAL—ABANDONMENT OF CANAL.
The State of Ohio, by its board of public works, gave certain leases of the surplus waters in the canals which was not required for navigation, reserving the right to resume the privilege whenever deemed necessary for navigation. Among others it owned a canal connecting at Cincinnati by locks with the Ohio River. The plaintiff had a lease of the surplus water around one of these locks. In 1863 the State granted to the city this part of the canal for a highway. *Held*, that this grant was an abandonment by the State of the canal for purposes of navigation; that the lease held by the plaintiff did not import an obligation to maintain the canal for the mere purpose of supplying surplus water, that the State might under its contract abandon the canal for navigation purposes at any time, and that the use of it by the city created no liability on its part to the plaintiff. *Fox v. Cincinnati*, U. S. S. C., March 6, 1882, 3 Morr. Trans. 780.

7. EQUITY — CONTRACT OF STATE TO HOLD AS TRUSTEE—CONFLICTING GRANT—RIGHT TO FILE INTERVENING PETITIONS.
The State of Indiana, after the original construction of the Wabash and Erie Canal, passed an act authorizing the engineer of the canal to let out a contract to so clear and improve the canal as to make surplus water power available, and pledging to the contractors all the rents received from the lease of such water power till they were paid; and certain contractors undertook and completed the work. Some leases were made, and the rents paid over to the contractors. Later, the State granted to a mill owner on the St. Joseph river, whose mill had been almost deprived of water by tapping the river for the canal above his mill, and who was claiming damages from the State, the right to draw off from the canal a certain amount of water for a mill free of rent, which he accepted, released his claim for damages, and proceeded to make costly improvements. Subsequent to this the State issued certificates of indebtedness to fund a portion of the original cost of constructing the canal, and granted all its interest in the canal to trustees in pledge to secure these certificates, subject to all existing rights and equities against the State on account of the same. A chancery suit was brought by a holder of one of these certificates against the trustees alone as defendants, in which the canal was sold free of incumbrances and the proceeds paid into court. Petitions being filed by these lessees and contractors asking to be made parties, and to be allowed to share in the proceeds, which were dismissed by the lower court on demurrer: *Held*, 1. That the effect of the agreement with the contractors was to convey to them a property right in the rents produced by leasing the water power, and to make the State a trustee to collect and pay over the rents as fast as collected until the contractors were paid, and that it operated as a complete transfer in equity. 2. That the agreement to permit the mill owner to draw water from the canal was in effect an absolute grant for a valuable consideration of the right, and that it was a property right, and the legitimate subject of a grant. 3. That the trustees merely obtained the State's interest, subject to all prior incumbrances, and hence that the rights of the contractors and mill owners were superior to those of the trustees, or of those claiming under a judicial sale of their interest. 4. That the contractors, mill owner and other lessees while not necessary would have been proper parties, and were entitled to intervene by petition, and submit to adjudication their rights against the proceeds of sale as the representative of the *res* itself. *French v. Gapin*, U. S. S. C., March 6, 1882, 4 Morr. Trans. 120.

8. EXECUTION— IMPROPERLY SATISFIED BY LEVY AND SALE—VACATION OF LEVY AND ISSUE OF ALIAS.
Where a levy has been made on property where the debtor has no title or interest, the property sold, the execution returned satisfied, and afterwards the property is replevied by a third party, to whom it is finally adjudged by the court, the creditor may make application to the court to vacate the levy and satisfaction, and to award a new execution. This application is addressed to the power of the court to correct its own records, and this power may be lawfully exercised by the court on motion, accompanied by affidavit and notice. *Zeigler v. McCormack*, S. C. Neb., June 22, 1882, 13 N. W. Rep. 28.

9. EXEMPTION—SALOON—POOL TABLE NOT EXEMPT.
A saloon is supposed to be a place for obtaining refreshment; and a pool table belonging to it is not, as matter of law, exempt from execution as apparatus necessary to enable the saloon-keeper to carry on his business. *Goozen v. Phillips*, S. C. Mich., June 21, 1882, 12 N. W. Rep., 889.

10. FEDERAL JURISDICTION—APPEAL—DECREE FOR LESS THAN $5,000.
Where the decree against the defendant is for less than $5,000, and she appeals, the fact that the decree should have been for more than $5,000 can not be urged by the defendant in order to give this court jurisdiction. *Lamar v. Micou*, U. S. S. C., October Term, 1881, 3 Morr. Trans., 349.

11. FEDERAL JURISDICTION — CASE DECIDED BY STATE COURT—FEDERAL QUESTION.

A case decided by a State court on a ground that was not a Federal question, is not reviewable here. To give this court jurisdiction the record must show that a Federal question was raised and decided. *Boughton v. American Exchange National Bank*. U. S. S. C., October Term, 1881, 3 Morr. Trans., 279.

12. FRAUDULENT CONVEYANCES—BONA FIDES—SALE UNDER DECREE.

Certain decrees rendered against a father, as guardian of his two daughters, for a large sum in their favor, on which executions were issued and under which his property was nearly all sold: *Held*, on the evidence to be valid and *bona fide*, in a suit brought by other creditors to set all the decrees and proceedings aside, as made by collusion for amounts larger than what was really due, and alleged to be in pursuance of a design and conspiracy to hinder, delay, and defraud his creditors. *Micou v. First National Bank of Montgomery*, U. S. S. C., October Term, 1881, 3 Morr. Trans., 554.

13. FRAUDULENT CONVEYANCE—INSOLVENT MORTGAGOR—FRAUDULENT PREFERENCE.

1. A mortgage executed by an insolvent mortgagor and covering his entire estate, to his creditor, who knows of his insolvency, and who, for the purpose of giving him a fictitious credit, conceals the mortgage and withholds it from the record, and represents the mortgagor as having a large estate and unlimited credit, by which means the latter is enabled to contract other debts which he can not pay, is void at common law. 2. A mortgage executed by an insolvent debtor with intent to give a preference to his creditor, who has reasonable cause to believe him to be insolvent and knows it to be made in fraud of the provisions of the bankrupt act, and who, for the purpose of evading the provisions of that act, actively conceals and withholds it from the record for two months, is void under the bankrupt act, although executed more than two months before the filing of a petition in bankruptcy by or against the mortgagor. *Blennerhassett v. Sherman*, U. S. S. C., April, 1882, 14 Reporter, 161.

14. INJUNCTION—DISSOLUTION—CHANCERY JURISDICTION TO ASSESS DAMAGES.

A court of chancery has an inherent power to assess damages upon the dissolution of an injunction. Such assessment becomes an incident of the principal case, and enables the court to do entire equity between the parties, and it would seem to be the duty of the court to proceed in the case, and not compel the party to resort to an independent action at law for the recovery of his damages. *Lea v. Deakin*, U. S. C. C., N. D. Ill., August 8, 1882, 14 Ch. Leg. N., 391.

15. INSURANCE—PAYMENT OF PREMIUM—TAKING NOTE—USAGE.

1. While taking a note in payment of a premium due on a policy of insurance is a waiver of the conditional forfeiture for non-payment of the premium, yet where there is an express condition that the policy shall be void on failure to pay such premium note at maturity, it is not a waiver of this secondary condition. 2. A usage and custom of an insurance company not to demand punctual payment of a premium note at the day is a mere matter of voluntary indulgence, and not a permanent waiver of the clause of forfeiture, or an agreement to do the same in future. *Thompson v. Knickerbocker Life Ins. Co.*, U. S. S. C., October Term, 1881, 3 Morr. Trans., 332,

16. INSURANCE—REFUSAL TO PAY POLICY—WAIVER OF PROOF OF LOSS.

Where the secretary of a mutual insurance company declares that the company will not pay a loss, it is a waiver not only of preliminary proofs, but also of a condition in the policy that suit shall not be commenced until the expiration of ninety days after proof of loss. *Farmers' Mut. Fire Ins. Co. v. Ensminger*, S. C. Pa., May 22, 1882, 12 W. N. C., 9.

17. INTEREST — WHEN DUE — CONSTRUCTION OF NOTE.

Where a note is made payable at a future day "with" interest at a prescribed rate per annum, such interest does not become due or payable until the principal sum does, unless there is a special provision in the note or contract to that effect. *Tanner v. Dundee Land Investment Co.*, U. S. C. C., D. Oreg., July 5, 1882, 9 Pac. C. L. J., 706.

18. LIMITATIONS — NEW PROMISE — REQUEST FOR DELAY, INSUFFICIENT.

In order to take a case out of the statute of limitations there must be either a promise to pay, or an acknowledgment of the debt, consistent with a promise to pay. A mere request to delay bringing suit is not at all inconsistent with a denial of liability, and will not toll the running of the statute. *Junior Steam Fire-Engine Co. v. Douglas*, S. C. Pa., April 3, 1882, 12 W. N. C., 11.

19. MORTGAGE — FORECLOSURE — EQUITY OF REDEMPTION.

A bill of review which prayed to have so much of a decree set aside as denied the statutory right of redemption given by the State law in cases of foreclosure of a mortgage, dismissed, it appearing that the party wishing to redeem did not make the offer to redeem in the time required by the statute, and the court holding that he could not make such offer after such time had expired, and that therefore it could serve no good purpose to set aside such decree, even if erroneous. *Burley v. Flint*, U. S. S. C., March 13, 1882, 4 Morr. Trans., 270.

20. MUNICIPAL BONDS—LEGALITY OF ISSUE—ELECTION.

One section of the charter of a railroad provided that the counties along its line might make subscriptions or donations to the railroad after a popular vote authorizing it; and another section provided that a particular county might, by its board of supervisors, make a subscription of a certain amount, and did not require a popular vote: *Held*, that the two sections were not inconsistent, and that a donation might be made under one and a subscription under the other. The mere transposition of two of the words of the name of the railroad to which the aid was to be voted in the petition for and notice of the election authorizing the subscription, did not avoid the donation nor the election, it being evident what railroad was intended. *Moultrie County v. Fairfield*, U. S. S. C., March 6, 1882, 4 Morr. Trans., 140.

21. NEGLIGENCE—DUTY OF STABLE KEEPER TO HORSE.

In an action for damages against a stable keeper for negligence in allowing a sack of corn to be left open upon the barn floor, and the horse of plaintiff in the night got loose and ate from the sack, from the consequences of which the horse was injured: *Held*, that the defendant's duty was not that of an insurer of the safety of the horse, and that he could only be held responsible in case the

jury found that he had been guilty of negligence, and that plaintiff did not contribute to the injury; and the refusal of instructions to this effect is error. *Dennis v. Huyck*, S. C. Mich., June 21, 1882, 12 N. W. Rep., 878.

22. NEGLIGENCE — NITRO-GLYCERINE — PRESUMPTIONS.

In an action for negligently causing the death of plaintiff's intestate, a switch tender employed by a railway company, through the explosion of nitro-glycerine being transported by it on its road, it was *held*, that the defendant, in complying with a proper request from another railroad company to run for it a short distance one of its cars, to be loaded with an article, safe when properly handled, but dangerous when carelessly handled, is not bound to assume that negligence on the part of those handling it would occur, nor bound to take measures for the protection of its servants on that assumption. *Foley v. Chicago, etc. R. Co.*, S. C. Mich., June 21, 1882, 12 N. W. Rep., 879.

23. PATENT—COMBINATION OF OLD ELEMENTS—MUTUAL QUALIFICATION.

In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other; that is, either a new machine of a distinct character and function must be formed, or a result produced which is due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions. *Pickering v. McCullough*, U. S. S. C., October Term, 1881, 3 Morr. Trans., 321.

24. PATENT—INFRINGEMENT—EVIDENCE.

As against a party proved to have infringed a patent is *prima facie* evidence of both novelty and utility. *Lehnbeuter v. Holthaus*, U. S. S. C., March 6, 1882, 4 Morr. Trans., 112.

25. PATENT—REMEDY FOR INFRINGEMENT—EQUITY JURISDICTION.

The court, after reviewing the decisions on the rule of damages for infringements of patents and the various cases in England and America on the subject of chancery jurisdiction as founded on the want of a complete remedy at law, decides: 1. That a bill in equity for a naked account of profits and damages against an infringer of a patent can not be sustained. 2. That such relief ordinarily is incident to some other equity, the right to enforce which secures to the patentee his standing in court. 3. That the most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement. 4. That grounds of equitable jurisdiction may, however, arise, other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal; and such an equity may arise out of and inhere in the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his legal remedy difficult, inadequate and incomplete; which latter cases must each rest upon its own particular circumstances as furnishing a clear ground of exception from the general rule. 5. That the rule holding an infringer a trustee for the patentee is a mere rule of administration, in cases where the jurisdiction to grant equitable relief is clear on other grounds, and does not confer equitable jurisdiction as creating a trust. *Root v. Lake Shore, etc. R. Co.*, U. S. S. C., March 13, 1882, 4 Morr. Trans., 240.

26. PUBLIC LANDS—LAND GRANT—ALTERNATE SECTIONS—CONSTRUCTION.

A grant of lands to a railroad, by an act of Congress, alternate sections, without prescribing any lateral limit, construed to mean that the grantee could go off the line of the road only in case, at the time when its rights vested, there was not sufficient land on its line unappropriated to satisfy the grant. *Wood v. Burlington, etc. R. Co.*, U. S. S. C., October Term, 1881, 3 Morr. Trans., 343.

27. RAILROAD MORTGAGE—RIGHT OF TRUSTEES, AS WELL AS BONDHOLDERS TO FORECLOSE.

1. In a railroad mortgage which is declared to be for the purpose of securing the payment of the interest as well as the principal of certain bonds, and where the mortgagor's right of possession terminates upon a default in payment of the interest as well as principal of any of the bonds, the trustees in the mortgage or any bondholder, on non-payment of any interest, may file a bill for foreclosure and sale, and will be entitled to a decree *nisi*, ascertaining the amount of interest due, and giving the debtor a reasonable time to pay it. In case of non-payment, a sale may be made and the proceeds applied to the payment of interest and also of principal; but the debtor, at any time before the sale or its confirmation, may redeem by bringing into court the amount of unpaid interest and costs. 2. The decree on which the sale is based must find correctly the fact, nature and extent of the default which constitutes the breach of the condition of the mortgage, and the amount due on account thereof; and a decree which orders a sale for the non-payment of a larger amount than is actually due is fatally erroneous. 3. Where the foundation of the trustees' right to foreclose was, that a certain amount of interest should be in default, and it was shown that such default had occurred, but there was nothing in the record to show that the coupons as to which default had been made had not been funded under certain funding agreements granting an extension, and the default so waived, and it was not even shown that the coupons held by some of the complainants had not been funded—this was not sufficient to justify a foreclosure based on such default as a necessary condition precedent. 4. Nor is such foreclosure justified by the fact that the company, after loss of possession of its property by the foreclosure proceedings, failed to pay interest; for the steps taken as a necessary preliminary to foreclosure must stand or fall upon the circumstances existing when they were taken, and can not be supported or validated by subsequent occurrences. 5. A mere provision that in case of a sale for default of interest, the proceeds are to be applied to the payment of principal also, does not make the principal due before the stipulated time, nor prevent the mortgagor from redeeming by the mere payment of interest. 6. Provisions imposing penalties being strictly construed, in a paragraph of a mortgage which provides that "if default be made in the payment of any half-year's interest on any of the bonds secured, and such default continue for more than six months after demand without the consent of the holder, then the principal of all the bonds shall immediately become due, and the trustees may so declare the same and notify the debtor; and, upon the written request of the holders of a majority of the said bonds, shall proceed to collect both principal and interest,"—the latter clause

held to render such written request a necessary condition precedent to foreclosure proceedings, and not merely to render imperative on the trustees a power claimed to have been made optional with them by the first clause. *Chicago, etc. R. Co. v. Fosdick*, U. S. S. C., March, 1882, 4 Morr. Trans., 1.

28. REVENUE LAWS—IMPORT DUTIES.
1. The act of Congress of June 6, 1872, "to reduce duties on imports," placing certain articles on the free list, repeals, so far as those articles are concerned, that part of the act of June 30, 1864, which imposed a discriminating duty on articles imported in foreign ships. 2. Inasmuch as the articles in the case at bar were imported directly from Ceylon, which is east of the Cape of Good Hope, the eighteenth section of the act of 1864 does not apply. *Gautier v. Arthur*, U. S. S. C., October Term, 1881, 3 Morr. Trans., 340.

29. STATUTE OF LIMITATIONS—WHEN IT WILL BEGIN TO RUN AGAINST A DETACHED COUPON.
Limitation under the statutes of Wisconsin to actions upon coupons of municipal bonds issued in 1857, payable twenty years after date. The cause of action upon a coupon, whether detached from the bond or not, held to accrue, and limitation to commence, from its maturity. *Town of Koskonong v. Burton*, U. S. S. C., Morch 6, 1882, 4 Morr. Trans., 152.

30. UNITED STATES—CONTRACT WITH BANK NOTE COMPANY—STAMPS UNCALLED FOR.
The Continental Bank Note Company *held* not entitled, under its contract, to recover compensation from the United States for the stamps manufactured by it and not called for by the United States. *Continental Bank Note Co. v. United States*, U. S. C., March 20, 1882, 4 Morr. Trans., 197.

NOTES.

——Without any doubt, the invention of the postal card has furnished the business world with a great convenience for brief correspondence; but, like many other labor saving contrivances, it may, through carelessness, be so misused and abused as to be productive of more trouble by far than it saves. Thus, a presumable subscriber writes: "You omitted to send me the last number of the JOURNAL," omits the name of his town and State, and signs his name in an absolutely illegible fashion. By a not unusual combination of circumstances, the post mark is so faint as to be illegible and furnish no clue to the mystery. There is no help for it, and our subscriber is at present probably heaping undeserved anathemas upon our innocent head, because we fail to send him the missing number, all of which is the consequence of his own carelessness.

Another of these economizers of labor writes: "Please send me at once, No. —, Vol. —, of Cent. L. J., containing case of —— v. ——. Please send it at once, as I will need it in court next Monday." Signed, "John Smith." As usual, no date, no town, no State, and the post mark so defaced as to be undecipherable. The name occurs a number of times on the subscription ledger, and furnishes no clue to the writer's identity. The consequence is, in all probability, that Monday finds him making strenuous efforts to induce the court to grant him a delay, and the chances are that he blames us for the legitimate results of his own negligence. Even greater care is necessary in the use of postal cards, than in that of ordinary letter paper, for there the printed letter-head furnishes information of the place, and not infrequently helps out an illegible signature. The use of a postal card instead of a letter will save the correspondent an expense of two cents, as well as the trouble of folding the sheet and sealing the envelope, but it will not write the message for him; nor is there anything talismanic in the card itself which will enable the recipient by a process of divination to supply the essential parts of the message omitted by the sender.

——"We were riding along the road one chilly day in November," said General James Craig, talking about court business and legal talent, "when we struck a small stream that appeared to be about thirty yards wide. 'Hello,' said Judge ——, of Missouri, 'this is a new stream to me. How shall we cross it?' Taking advantage of his ignorance, I pretended to survey the situation, and after emerging from the thicket I solemnly inquired: 'Judge, can you swim?' 'Like a fish,' he replied, while his eyes twinkled in the expectation of displaying his ability in that direction. 'I can't' said I, 'so suppose you strip off and swim across, testing the depth as you go, and give me the advantage of your experience.' 'All right,' he said, dismounting from his horse. Then he removed all his clothes, tied them together, placed them safely between his teeth, and started cautiously into the creek. I choked my handkerchief into my mouth to keep from laughing, while the judge gravely waded across through exactly four inches of water; but you would have died to see his look of unutterable disgust when he reached the opposite bank. His feet were blue with mud, but his ankles were scarcely touched by the water. It was three straight days before he spoke to me again."—*Philadelphia Times.*

——The inability of a lawyer to answer a question directly is illustrated by a recent exchange of letters between the Chicago lawyer, Emery A. Storrs and a friend. The latter asked Mr. Storrs whether his first name was "Emery" or "Emory," and Mr. Storrs began his reply by saying: "My signature hereunto appended will settle the e and o question," and then he wrote three pages about social and political matters, at the end of which were these words: "Yours truly, E. Storrs."—*New Haven Register.*